

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MARLIN AUDRY SLEEMAN,

Defendant-Appellee.

UNPUBLISHED

May 24, 2005

No. 253510

Kent Circuit Court

LC No. 03-002588-AR

Before: Neff, P.J., and White and Talbot, JJ.

PER CURIAM.

Plaintiff appeals by leave granted an order of the circuit court that reversed defendant's jury trial convictions of two counts of disorderly conduct based on MCL 750.167(1)(f) (engaging in indecent or obscene conduct in a public place).¹ We affirm in part, reverse in part, and remand.

I

Defendant was convicted in district court of two counts of disorderly conduct under MCL 750.167(1)(f), which proscribes engaging in "indecent or obscene conduct in a public place." In instructing the jury, the trial court defined indecent as "grossly unseemly or offensive to manners or morals," a definition referenced in *People v Vronko*, 228 Mich App 649, 654; 579 NW2d 138 (1998), with regard to "indecent exposure" under MCL 750.335a. We hold that the trial court erred in relying on the dictionary definition of "indecent" referenced in *Vronko* to define the offense of indecent conduct under MCL 750.167(1)(f). In light of the erroneous instruction, we affirm the circuit court's order reversing defendant's convictions.

¹ Defendant was sentenced to two years' probation and was given a suspended sentence of ninety days in jail.

II

Defendant's convictions arise from an ongoing conflict with neighbors in her subdivision over defendant's sunbathing habits. Neighbors repeatedly complained to police that defendant's attire and conduct were inappropriate. Defendant was charged with two counts of disorderly conduct (engaging in indecent or obscene conduct in a public place) stemming from her behavior on August 5 and 7, 2002, at her home in the Lake Bella Vista subdivision in Cannon Township.

At trial, several neighbors testified that defendant's sunbathing conduct was offensive. According to testimony, defendant frequently sunbathed in her front yard, scantily clad, in offensive positions, gyrating her body in front of neighbors. On the days at issue, defendant was gyrating in her front yard with her shirt pulled up just under her breasts and her pants pulled down to just above her pubic line and was also seen sunbathing spread-eagled in a two-piece bathing outfit, with a bikini bottom that by all accounts was too-small for her size. A photograph, taken by a neighbor and admitted into evidence, showed defendant reclining in a folding sport chair, spread-eagled, exposing the crotch of her bikini bottom, with a plate of food on her abdomen. Neighbors testified that defendant sat right next to the street, in full view of passers-by and children playing outside. She could be heard calling her cat, "pussy," saying, "Here, pussy, pussy," "Come sit on my pussy," and was seen rubbing her crotch.

According to testimony, at various times defendant also pulled her bikini bottom up so that her bare buttocks were exposed, turned her partially exposed rear end toward the street, and gyrated while bending over. Likewise, she walked up and down the street with her bathing suit pulled up her rear end. One neighbor testified that defendant gave her "the finger." Another neighbor videotaped defendant on August 7, 2002, engaging in various alleged activities, and the tape was played for the jury.

Defendant, her fifteen-year-old son, a part-time handyman, and a neighbor testified on defendant's behalf. Defendant's son testified that the police had been to their home innumerable times because of neighbors' complaints. He and his mother both called the cat "pussy," which he did not perceive as offensive. The handyman also testified that the cat's name was "pussy" and that the police regularly came to defendant's home to investigate complaints.

The neighbor testified that she lived two houses away from defendant, that she had seen defendant sunbathing in a two-piece bathing suit, and the neighbor had never had any problem with defendant. Both defendant and her children were always very polite. She further testified that others in the subdivision wore their bathing suits outside in the subdivision, including walking down the street to the lake, and that a former neighbor across the street used to always mow her lawn in her bikini, although unlike defendant, that neighbor was "very good looking" and had a slim figure. None of defendant's witnesses had ever seen defendant engage in offensive or vulgar behavior.

Defendant testified and admitted that she wore rolled-down pants outside, which she stated were "hip pants." The neighbors constantly videotaped her and bothered her and her children. She preferred to sunbathe in her front yard, where the sun was best. She sat spread-eagled to tan the inside of her legs. She denied that she ever rubbed her crotch or touched her genital area while sunbathing.

It was undisputed that defendant at no time exposed her genitals or breasts. It was also undisputed that other neighbors wore their bathing suits in the neighborhood.

III

Statutory interpretation is a question of law that is considered de novo on appeal. *People v Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003). Likewise, the constitutionality of a statute is a question of law, reviewed de novo on appeal. *People v Jensen (On Remand)*, 231 Mich App 439, 444; 586 NW2d 748 (1998). The constitutionality of a statute will generally not be considered unless it is essential to the disposition of the case and unavoidable. *People v Higuera*, 244 Mich App 429, 441; 625 NW2d 444 (2001).

Statutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional absent a clear showing of unconstitutionality. *People v Boomer*, 250 Mich App 534, 538; 655 NW2d 255 (2002); *Jensen, supra* at 444. The presumption of constitutionality may justify a construction that is against the natural interpretation of the statutory language if necessary to sustain the law. *Lowe v Dep't of Corrections (On Rehearing)*, 206 Mich App 128, 137; 521 NW2d 336 (1994).

IV

We first address the legal posture of this appeal, which is germane to our analysis and disposition. This case was tried in the district court, and it was there that defendant took exception to the trial court's jury instruction incorporating the *Vronko* definition of "indecent." Although defendant also filed a motion to dismiss the charges, which the trial court denied, the limited record before this Court fails to indicate the basis of the motion to dismiss. Nonetheless, defendant's objection to the *Vronko* definition, and the arguments before the district court, clearly centered on the allegedly erroneous jury instruction defining the charged offense.

Following her convictions, defendant appealed to the circuit court. The specific legal basis of her appeal was whether the jury verdict convicting defendant of indecent conduct contravened vagueness principles. The circuit court heard oral argument and subsequently issued a written opinion and order reversing defendant's convictions and directing that the charges be dismissed. Although the court discussed the legal context for deciding the constitutionality of the statute, the court ultimately found it unnecessary to decide the constitutional question, concluding that defendant's conduct did not violate subsection 167(1)(f) and could not, consistent with our Constitution, be any crime.

Plaintiff now appeals the decision of the circuit court and presents two questions for this Court's consideration. First, did the circuit court err in refusing to apply the definition of "indecent" from *Vronko*, and, second, did the court fail to apply the appropriate standard of review in considering whether the evidence was sufficient to sustain defendant's convictions. Defendant has not filed a cross appeal and argues the constitutionality of MCL 750.335a only indirectly in the context of the questions presented. However, the American Civil Liberties Union Fund of Michigan has filed an amicus curiae brief addressing the constitutional issue presented: whether MCL 750.335a, interpreted by the trial court to proscribe conduct that is "grossly unseemly or offensive to manner or morals," is unconstitutionally vague.

As the amicus brief points out, this case raises fundamental questions concerning the constitutionally permissible standard for criminalizing “indecent conduct.” However, we need not reach the broader issues of the constitutionality of the statute because they are not essential to our disposition of the case. *Higuera, supra* at 441. These constitutional issues are raised only indirectly by the parties, in the context of whether the trial court erred in applying the *Vronko* definition of “indecent” in instructing the jury. Accordingly, our decision and disposition are narrowly confined by the issues raised.

V

Plaintiff argues that the circuit court erred by refusing to apply the definition of “indecent” approved by this Court in *Vronko*. We disagree. The definition of “indecent” in *Vronko* was referenced with respect to the common uses of the words contained in the indecent exposure statute,² which the Court considered together with judicial constructions in determining that the statute was not unconstitutionally vague as applied to the defendant. *Vronko, supra* at 653-654. We conclude that the *Vronko* definition, standing alone, is insufficiently explicit and limited to define the criminal offense of indecent conduct under MCL 750.167(1)(f).

A

The due process guarantee is applicable to legislation concerning criminal matters and requires that a statute or ordinance defining an offense and fixing punishment therefore must be sufficiently explicit and limited. 7 Michigan Law and Practice, Constitutional Law, § 364, pp 350-351. Criminal legislation that is vague or overbroad may be violative of the due process guarantee. *Id.* at 351; *Boomer, supra* at 539-540. To pass constitutional muster, a penal statute must define the criminal offense with sufficient definiteness that ordinary people understand what conduct is prohibited and so that the statute does not encourage arbitrary and discriminatory enforcement. *People v Lino*, 447 Mich 567, 575; 527 NW2d 434 (1994).

A statute is unconstitutionally vague or overbroad if (1) it does not provide fair notice of the type of conduct proscribed, (2) it confers on the trier of fact unfettered discretion to determine whether an offense has been committed, or (3) its coverage is overbroad and impinges on First Amendment freedoms. *Vronko, supra* at 652; *Plymouth Charter Twp v Hancock*, 236 Mich App 197, 200, 202; 600 NW2d 380 (1999). Although distinct jurisprudential concepts, the void-for-vagueness and overbreadth doctrines are both concerned with curbing arbitrary and discriminatory enforcement. *Plymouth Charter Twp, supra* at 199-200.

When making a vagueness determination, a court must take into consideration any judicial constructions of the statute. *Lino, supra* at 575; *Vronko, supra* at 653. A statute is not vague if the meaning of the words in controversy can be fairly ascertained by reference to judicial determinations, the common law, dictionaries, treatises, or their generally accepted meaning. *Id.*

² MCL 750.335a.

In *Vronko*, the defendant challenged the indecent exposure statute, MCL 750.335a, as unconstitutionally vague on its face and as applied to him. *Vronko, supra* at 651. The defendant was convicted of indecent exposure based on a witness's allegation and testimony that he was masturbating in a car parked on a street where children passed by on the way to school and was likely exposing himself to the children. Because the defendant's challenge did not implicate the First Amendment, the constitutionality of the indecent exposure statute was examined only in light of the facts of the case without concern for the hypothetical rights of others. *Id.* at 652. The Court considered whether the statute was vague as applied to the conduct proscribed in that case and not whether the statute may otherwise be susceptible to impermissible interpretations. *Id.*

The Court first noted prior judicial determinations concerning indecent exposure, which had observed that the well-settled and generally known significance of the phrase "indecent and obscene exposure" included the exhibition of those private parts of the person that instinctive modesty, human decency or natural self-respect required should customarily be covered in the presence of others, *People v Kratz*, 230 Mich 334, 337; 203 NW 114 (1925); *People v Ring*, 267 Mich 657, 662; 25[5] NW 373 (1934). Further, this Court had specifically held that a "defendant's on-stage act of masturbation in the presence of a consenting audience could constitutionally be prohibited under the indecent exposure act." *Vronko, supra* at 653.

The *Vronko* Court continued its analysis by looking to the common uses of the words in the indecent exposure statute, referring to the dictionary definitions of "open," "exposure," "indecent," and "indecent exposure":

With respect to the common uses of the words contained in the statute, *Webster's New Collegiate Dictionary* (1977) defines "open," in part, as being "exposed to general view or knowledge," "having no protective covering," and "to disclose or expose to view." Likewise, the word "exposure" is defined as meaning a "disclosure to view" especially of "a weakness or something shameful or criminal." *Id.* "Indecent" is defined as "grossly unseemly or offensive to manners or morals." *Id.* Finally, "indecent exposure" is defined as being an "intentional exposure of part of one's body (as the genitals) in a place where such exposure is likely to be an offense against the generally accepted standards of decency in a community." *Id.* [*Vronko, supra* at 653-654.]

The Court concluded that given the definitions and judicial constructions, the indecent exposure statute was not unconstitutionally vague as applied to defendant. *Id.* at 654.

B

The definition of "indecent" in *Vronko*, has only limited application to the circumstances of this case. Contrary to plaintiff's argument, this Court did not "approve" the definition of "indecent" in *Vronko*, such that it could be said to define the offense of indecent conduct. The *Vronko* Court properly considered whether "the meaning of the words in controversy [could] be fairly ascertained by reference to judicial determinations, the common law, dictionaries, treatises, or their generally accepted meaning." *Vronko, supra* at 653. Defendant's objection in this case merits a similar inquiry, not merely the unconsidered adoption of a dictionary definition to define the offense of indecent conduct and decide whether defendant's conduct is criminal.

Our courts have long struggled with applying statutes that proscribe indecencies, and other similarly broadly defined conduct, to avoid constitutional infirmities. In *People v Hicks*, 98 Mich 86, 90; 56 NW 1102 (1893), the court defined “indecent and improper liberties with the person of such child” as meaning “such liberties as the common sense of society would regard as indecent and improper.” *People v Howell*, 396 Mich 16, 22; 238 NW2d 148 (1976), citing *People v Carey*, 217 Mich 601; 187 NW 261 (1922). In *Howell*, a majority of the Court held that the gross indecency statute was not unconstitutional under the facts at issue because although the term “act of gross indecency” standing alone failed to give adequate notice of the conduct proscribed, the gross indecency statutes had long been applied in the courts to acts of forced fellatio and fellatio with a minor and so the defendants had adequate warning that the charged acts were proscribed. *Howell, supra* at 21-22, 29. However, a minority of the Court would have held further that while this Court had adopted the *Hicks-Carey* rationale and had applied a “common sense of society” test under statutes of the indecent liberties or gross indecency type, the test should be rejected in a prosecution for gross indecency involving fellatio or other sexual acts between consenting adults in private, there being no common sense of society regarding sexual behavior between consenting adults in private. *Id.* at 22-24. Complaining that the test leaves the trier of fact free to decide without any legally fixed standard what is prohibited and what is not in each particular case, the minority would “construe the term ‘act of gross indecency’ to prohibit oral and manual sexual acts committed without consent or with a person under the age of consent or any ultimate sexual act committed in public.” *Id.* at 23-24.

Subsequently, the Court in *Lino, supra*, again addressed the common sense of society test and whether the gross indecency statute, MCL 750.338, was unconstitutionally vague as applied to certain sexual conduct. A majority of the Court held that the statute was not unconstitutionally vague as applied and rejected the common sense of society test with regard to the definition of gross indecency. *Id.* at 570-571. The majority held that oral sexual conduct committed in a public place is grossly indecent under MCL 750.338 and that procuring or attempting to procure certain alleged sexual conduct with a person under the age of consent supports a conviction under the statute regardless whether the conduct is performed in public. *Id.*

However, other judicial determinations have repeatedly circumscribed broad and general criminal proscriptions of indecency as constitutionally infirm when the alleged conduct was not sexual conduct. In *Plymouth Charter Twp, supra* at 198, the defendant allegedly directed a barrage of insults at his neighbor and was prosecuted under a township ordinance, which provided:

It shall be unlawful for a person to disturb the public peace and quiet by shouting, whistling, loud, boisterous, or vulgar conduct, the playing of musical instruments, phonographs, radios, televisions, tape players or any other means of amplification at any time or place so as to unreasonably annoy or disturb the quiet, comfort and repose of persons in the vicinity.

This Court held that the use of the reasonable person standard, “so as to unreasonably annoy or disturb,” saved the ordinance from being impermissibly vague or overbroad. *Id.* at 201-202. The Court noted that the reasonable person standard assured fair notice and also served to prevent any ad hoc and subjective application by police officers, judges, juries, or others empowered to enforce the ordinance. *Id.* at 202.

More recently in *Boomer, supra*, the Court considered a constitutional challenge to MCL 750.337 after a defendant was convicted of using indecent and vulgar language. The statute provided:

Any person who shall use any indecent, immoral, obscene, vulgar or insulting language in the presence or hearing of any woman or child shall be guilty of a misdemeanor. [*Id.* at 536.]

The Court held that the statute was an unconstitutional enactment in violation of the Due Process Clause because the statute was facially vague. *Id.* at 542. The Court noted that “it would be difficult to conceive of a statute that would be more vague . . .” *Id.* at 540. The Court observed that unlike the ordinance at issue in *Plymouth Charter Twp, supra*, MCL 750.337 contained no restrictive language, such as the term “unreasonably” to provide fair notice or guide enforcement. *Boomer, supra* at 540-541. Further, even if the statute were judicially construed to apply only to speech that a reasonable person should know is indecent, immoral, or vulgar when used in the presence of a child, as the prosecutor urged, it would remain impermissibly vague, because it was far from obvious what the reasonable adult considers to be indecent, immoral, vulgar or insulting. *Id.* at 541.³

Subsequently, in *People v Barton*, 253 Mich App 601, 602; 659 NW2d 654 (2002), the Court considered a Manistee city ordinance that prohibited a person from engaging “in any indecent, insulting, immoral or obscene conduct in any public place.” The Court reversed the defendant’s conviction, which was based on the defendant’s oral reference to other restaurant patrons as “spics.” *Id.* This Court concluded that the trial court’s construction of the ordinance, limiting its application to “fighting words,” satisfactorily limited the statute to a constitutionally permissible scope. *Id.* at 606. Accordingly, as judicially construed, the statute was not unconstitutionally vague on its face because limiting the application of the ordinance to “fighting words” provided fair notice of conduct that can be proscribed constitutionally and was sufficiently definite to prevent arbitrary and discriminatory enforcement. *Id.* Nevertheless, the ordinance was unconstitutionally vague as applied to the defendant because the term “insulting” did not give adequate forewarning that referencing a person by a racial slur may rise to the level of “fighting words” that can be proscribed constitutionally. *Id.* at 607.

³ As in *Boomer*, the statute at issue in this case contains no restrictive language to guide enforcement according to any societal standard.

Other cases may be found in which the courts have upheld laws variously proscribing some form of indecent conduct, either by applying a limiting construction to the law or by concluding that the particular conduct at issue was clearly within constitutionally permissible bounds of what is considered indecent. See e.g.; *United States v Biocic*, 928 F2d 112, 113-115 (CA 4, 1991) (generally held that the word “indecent” applies to public nudity and therefore the defendant was on notice that full exposure of her breasts while walking in a federal park was prohibited by a federal regulation that proscribed “[a]ny act of indecency or disorderly conduct as defined by State or local laws . . .”); compare *FCC v Pacifica Foundation*, 438 US 726, 740; 98 S Ct 3026; 57 L Ed 2d 1073 (1978) (noting that the normal definition of “indecent” simply refers to nonconformance with accepted standards of morality and does not necessarily encompass the element of prurient appeal).

While we readily admit the difficulty inherent in defining indecent conduct generally, we recognize that this difficulty does not necessarily render the statute itself facially invalid. The courts have upheld indecency statutes and convictions if the conduct is clearly circumscribed and constitutional infirmities are clearly avoided. These cases demonstrate that, at the very least, the statute at issue must be sufficiently limited, either in definition or in application, to pass constitutional muster.

2

In this case, even disregarding other grounds for a vagueness challenge, we conclude that the district court’s jury instruction defining indecent conduct solely by the *Vronko* definition was error because it conferred on the jury unfettered discretion to determine whether an offense had been committed. *Vronko*, *supra* at 652; *Plymouth Charter Twp*, *supra* at 200. The court’s definition of indecent as merely “[g]rossly, [sic] unseemly, [sic] or offensive to manners or morals” permitted a purely subjective determination by the factfinder regarding whether defendant’s conduct was criminal. Under the court’s definition, there is no restrictive language to limit or guide a prosecution or a determination of guilt with respect to indecent conduct. *Boomer*, *supra* at 540. Jurors were guided only by their own subjective views of what is offensive to manners or morals. The district court’s interpretation violated due process by impermissibly delegating basic policy matters to the jury for resolution on an ad hoc and subjective basis. *Id.*

That the court’s interpretation allowed an impermissible subjective determination of guilt is borne out by the prosecutor’s closing argument. The prosecutor essentially argued that defendant’s guilt was to be judged by the subjective morals and manners of the prosecution witnesses and jurors. In her closing argument, she stated that “[a]ll these witnesses have children and they all found the defendant’s conduct offensive to their morals and manners such that they took time to make reports, to come to court here today and testify to you all.” Likewise, in rebuttal argument, she relied on the jurors own subjective morals and manners for a conviction, stating:

Anybody can sunbathe, yes. What you can’t do is sunbathe while engaging in indecent conduct. Here indecent is defined as, “unseemingly—Grossly, unseemly, or offensive to somebody’s morals and manners.” We have a whole host of witnesses in here saying, “This kind of thing is offensive to me.”

The Legislature passes the laws and it is our job to enforce them and follow them. I asked all of you on the day of jury selection if you consider making sexual gestures or exposing part of your rearend [sic] to be considered indecent and you all agreed that that was.

This subjective analysis was the exact danger cited by defense counsel in her objection to the court's definition of "indecent." The trial court's construction of the indecent conduct statute creates a constitutionally impermissible standard for the offense of "indecent conduct." In effect, the definition, standing alone, provides no standard and leaves the subjective determination to the trier of fact. See e.g., *Boomer, supra* at 540 (allowing a prosecution for insulting language could possibly subject a vast percentage of the populace to a misdemeanor conviction). A vast majority of the public could be subject to criminal prosecution if the standard for indecent conduct under MCL 750.167(1)(f) was merely conduct "offensive to manners or morals" judged by the subjective views of a handful of society on any given day. We agree with the circuit court that defendant's convictions must be reversed.

C

Because we reverse defendant's convictions on the basis of the erroneous definition and jury instruction, we need not address plaintiff's remaining claim that the circuit court applied an incorrect standard in reviewing the sufficiency of the evidence. However, to the extent that plaintiff's argument also applies to the court's conclusion that the charges against defendant must be dismissed, it is germane to our disposition. We agree that the court was obligated to view the evidence in the light most favorable to the prosecution, and that the court failed to do so. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The court's conclusion that defendant's conduct did not constitute a crime under any constitutionally permissible standard is therefore unsound.

As discussed above, the courts have upheld indecency statutes and convictions if the conduct is clearly circumscribed and constitutional infirmities are avoided. "Even though a statute may be susceptible to impermissible interpretations, reversal is not required where the statute can be narrowly construed so as to render it sufficiently definite to avoid vagueness and where defendant's conduct falls within that prescribed by the properly construed statute." *People v Cavaiani*, 172 Mich App 706, 714; 432 NW2d 409 (1988).

Although the prosecution has offered no definition of "indecent" other than the constitutionally impermissible definition referenced in *Vronko*, whether the prosecutor desires to proceed under an alternative definition is a matter properly left to the discretion of the prosecutor. It is well settled that the decision whether to bring a charge and what charge to bring lies in the discretion of the prosecutor. *People v Venticinque*, 459 Mich 90, 100-101; 586 NW2d 732 (1998). If supported by the facts, the prosecutor has broad discretion to proceed under any applicable statute. *People v Yeoman*, 218 Mich App 406, 414; 554 NW2d 577 (1996); see also *People v Williams*, 244 Mich App 249, 254; 625 NW2d 132 (2001) (decision whether to dismiss a case or proceed to trial ultimately rests in the sole discretion of the prosecutor). Accordingly, we reverse the circuit court's order that the charges against defendant be dismissed.

We affirm the circuit court's reversal of defendant's convictions, but on different grounds from those articulated by the circuit court. We reverse the circuit court's dismissal of the charges, and remand to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff

/s/ Helene N. White